No. 80-759

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALBERTO SANCHEZ, ET AL., PETITIONERS

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the due process guarantees of the Constitution require that individual notice of a settlement hearing be given to all readily ascertainable members of a plaintiff class, regardless of the efficacy of other forms of notice.

2. Whether the notice of the proposed settlement provided members of the plaintiff classes with sufficient information about the terms of the settlement to satisfy the requirements of due process.

3. Whether the district court improperly refused to consider objections to the previously approved desegregation plan at the settlement hearing.

4. Whether the district court was required to disapprove a proposed settlement of a class action solely because attorneys fees were negotiated as part of the settlement.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 623 F. 2d 1338 (Pet. App. A). The findings of fact and conclusions of law of the district court are unreported (C.A.R. 2326-2816).[1] Orders of the district court pertaining to issues raised by the petitioners are also unreported (Pet. Apps. B-I).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1980 (Pet. App. A), and an order denying a timely petition for rehearing was entered on August 11, 1980 (Pet. App. K). The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a constitutional challenge to the procedures leading to the district court's order approving settlement of a school desegregation case. The petitioners, twenty-nine individuals who are members of the Mexican-American plaintiff class, one of two plaintiff classes, contend that they were denied due process of law because: (1) the notice of the settlement hearing was inadequate; (2) the legality of the school district's desegregation plan, which the district court approved prior to the settlement hearing, was not open to attack at the hearing; and (3) the Mexican-American plaintiff class was denied fair representation and a fair and adequate settlement because attorneys fees for counsel for the plaintiff classes were negotiated as part of the settlement of the remaining issues in the case.

2. Tuscon School District Number 1 (hereinafter the District) and its governing officials were sued in May 1974 by the Fisher plaintiffs, black students and their parents, for operating a racially segregated school system (Pet. App.

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[1] "C.A.R." refers to the Record in the court of appeals.

4). Later that year, the Mendoza plaintiffs filed a separate complaint against the District on behalf of Mexican-American students (*ibid.*).[2] The Fisher plaintiffs and the Mendoza plaintiffs were certified as representatives of black and Mexican-American classes respectively and the cases were consolidated for trial (*id.* at 4-5).[3] Two intervenors entered the suit before trial: White parents opposed to busing (Sidney L. Sutton, *et al.*) intervened as defendants in the Fisher suit but not the Mendoza suit (*id.* at 5). The United States intervened as a plaintiff in both the Fisher and Mendoza suits in December 1976 (*ibid.*). After extensive discovery the case was tried in January 1977 (*id.* at 6).

On June 5, 1978, the district court entered voluminous findings of fact and conclusions of law (C.A.R. 2326-2816). The district court found that the District had failed to dismantle its dual school system for blacks and non-blacks and had continued to discriminate against blacks since 1954, but it found no unconstitutional segregation of Mexican-American students nor any evidence of intentional, system-wide discrimination against them (Pet. App. 6-7). The court ordered the District to devise plans for the desegregation of nine schools (*id.* at 6) to remedy the constitutional violation.[4] The District filed several plans for desegregating the nine schools identified in the court's June 5

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[2]The original Mendoza complaint, which alleged unlawful racial segregation, was later amended to include allegations of (1) maintenance of a tri-ethnic segregated school system; (2) discriminatory tracking; (3) inferior curricula and facilities for minorities; (4) discrimination in the hot lunch programs; (5) discrimination in special education programs; (6) failure to take into account bilingual differences; and (7) lack of bilingual notices (Pet. App. 6).

[3]Both classes were certified pursuant to Rule 23(b)(2), Fed. R. Civ. P. (C.A.R. 66-67, 3837). The two classes together contained approximately 18,500 students (Pet. App. 118).

[4]The order also required the parties to take reasonable steps to insure that residents of the school district and class members knew of the

order, indicating which options it preferred (Pet. App. 8-9). The district court held hearings on the District's proposed desegregation plan on August 8 and 9 (*id.* at 12).[5] The court concluded that the District's preferred plan was adequate to remedy the constitutional violation it had found and approved the District's desegregation plan on August 11, 1978 (*id.* at 13).

3. Petitioner Alberto Sanchez became actively involved in the case after the District filed its desegregation plans. He objected to the plans because they called for the closure of three predominantly Mexican-American schools which, he felt, would unfairly burden some members of the Mexican-American class (Pet. App. 11). On July 27, 1978, Sanchez moved the court to substitute counsel for himself and a class he wished to represent (Pet. 6).[6] The district court ordered substitution of counsel for Sanchez and his children (*ibid.*).[7]

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contents of the proposed desegregation plans and had an opportunity to participate in the selection among them (Pet. App. 66-67). The order invited residents of the school district to address written comments to the court on any proposed plans and made provision for residents of the school district to be heard in open court concerning their objections or alternative suggestions (*id.* at 68-70). The District filed a report with the court prior to the hearing on the plan detailing the efforts it had made to publicize the plans (Pet. App. M).

[5]Petitioner Sanchez and defendant-intervenors Sutton, *et al.* lodged their objections to the proposed desegregation plans and presented alternatives (Pet. App. A13). Counsel for the United States and the Fisher and Mendoza classes did not cross examine witnesses or propose alternative plans because they had tentatively agreed to support the District's proposal pending approval of a settlement (*id.* at 12-13).

[6]Sanchez requested substitution of his own counsel for the Mendoza class counsel because of his dissatisfaction with Mendoza counsel's acquiescence in the school closures (Pet. App. 11).

[7]Sanchez also moved the district court to create a subclass of Mexican-American parents and children residing in the attendance zones of the three schools that were subject to the closure proposal (Pet. App. 11-12). The district court heard argument on the motion but

4. On August 4, 1978, four days before the hearing on the desegregation plan, the parties advised the district court that they had reached a settlement (Pet. App. 9). The proposed settlement was filed with the court on August 11, 1978 (Pet. App. J). It included, *inter alia*, the desegregation plan previously approved by the district court; it provided for parental involvement in the alteration of student assignment patterns, non-discrimination in suspension, expulsion, and student placement testing, the reassignment of black faculty in certain schools and the creation of a pilot bilingual reading program. The settlement also provided that the District pay counsel for the plaintiffs $500,000 in attorneys fees and costs. On August 14, 1978, the district court approved the settlement notice to class members (Pet. App. 14). Petitioner Sanchez was given the opportunity to obtain discovery on each element of the settlement, but not on the terms of the desegregation plan which had already been approved by court order. The court held a settlement hearing on August 30 and 31 to determine whether the settlement was "fair, just and adequate" (*id.* 15). The court declined to permit reexamination of the merits of the desegregation plan because it had already determined its constitutional adequacy and approved it as a judicial remedy. After considering all of the testimony at the settlement hearing,[8] the district court approved the settlement finding it reasonable, adequate and fair to both the black and Mexican-American class members (*id.* at 123).

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denied it (Pet. App. F). This ruling was unsuccessfully challenged in the court of appeals; that challenge is not raised in this Court.

[8]Despite the court's stated desire to avoid testimony on the merits of closure of the schools, much of the testimony at the hearing centered on dissatisfaction with the closures (Pet. App. 116). The parties to the settlement supported the agreement (*id.* at A15). Counsel for Sanchez filed objections to the settlement (*ibid.*). He indicated he represented 21 objectors, seven or eight of whom appeared and testified (*id.* at

5. Petitioners appealed the district court's orders approving the District's desegregation plan and the settlement, and its other rulings regarding notice and opportunity for involvement in the hearings on the plan and the settlement. The court of appeals upheld the desegregation plan as an adequate remedy and concluded that the district court had not abused its discretion in approving the settlement. It held that the notice of the settlement hearing was constitutionally adequate to both as to form and content, and that because the district court's order approving the District's preferred desegregation plan was entered after the district court had independently assessed the constitutional adequacy of the plan, that court had correctly ruled that the plan was not a subject of the settlement hearing. Although the court of appeals disapproved the practice of negotiating attorneys fees as part of the settlement in a class action, stating "we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations" (Pet. App. 58), it concluded that the settlement, including the fees, was fair, and that under all the circumstances, the settlement should not be set aside just because it contained a provision for attorneys fees.

ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure sets forth certain procedural requirements for managing class actions, which are designed to assure that any divergent interests of class members are adequately accommodated. District courts have broad discretion in managing the litigation and settlement of class actions to enable them to respond to the

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App. 117). Eleven class members testified in opposition to the settlement and the court received six letters opposed to it (*ibid.*). Additionally, some of the objectors obtained approximately ninety signatures on a petition listing objections to the proposed settlement (*ibid.*). The district court noted that the objectors totalled 121 out of two classes comprised of 18,500 students (*id.* at 118).

particular needs and circumstances of each case. As the court of appeals noted, petitioner challenges "the District Court's choices of how the required procedures were to be implemented" (Pet. App. 21), and the district court was in a better position than the appellate court to assess the adequacy of notice and the overall fairness of the settlement because of its long involvement with the case (*id.* at 37). The settlement occurred after a lengthy trial on liability, issuance of voluminous findings of fact and conclusions of law and hearings on the remedy and on the settlement (*id.* at 31-32). In sum, the petitioners have simply failed to demonstrate, either in the court of appeals or in their petition in this Court, that the procedures the district court chose to employ were prejudicial or inadequate, still less that those procedures were so faulty as to deny them due process of law. Moreover, the court of appeals applied the principles of law as set down by this Court, and the decision below is not in conflict with any decision of any other court of appeals. Thus, there is no reason for this Court to grant plenary review.

1. In arguing that the notice of settlement was inadequate, the petitioners do not show that notice was ineffective or that the district court was unaware of relevant facts or objections at the hearing on the settlement. Instead, they urge this Court to rule that the Constitution requires that in order to settle a class action "[i]ndividual notice must * * * be mailed to each person whose identity and whereabouts are readily ascertainable." (Pet. 18). The court of appeals' refusal to adopt such a per se rule is consistent with previous decisions of this Court (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950)) and with the decisions of other courts of appeals (*Grunin* v. *International House of Pancakes*, 513 F. 2d 114, 120-123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); *Fowler* v. *Birmingham News Co.*, 608 F. 2d 1055 (5th Cir. 1979); *West Virginia*

v. *Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090-1091 (2d Cir.), cert. denied, 404 U.S. 871 (1971)).[9]

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co., supra*, 339 U.S. at 314. Whether publication or other forms of notice of a settlement hearing afford due process depends on the "practicalities and peculiarities of the case" (*ibid.*). Here the notice of the settlement hearing was published in English and Spanish in two Tucson newspapers for approximately a week before the settlement hearing and notices were distributed widely throughout the community, although not mailed to each individual.[10] The court of appeals carefully reviewed the form of notice that was given and the indicia of its effectiveness using the due process standard set forth in *Mullane* v. *Central Hanover Bank & Trust.*[11] It observed that the district court was aware of the widespread local publicity (Pet. App. 49),

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[9]Contrary to petitioners' assertion, *Armstrong* v. *Board of School Directors*, 616 F. 2d 305 (7th Cir. 1980), is not in conflict with the decision here (Pet. 20). In *Armstrong*, the court of appeals simply noted that notice of a settlement in a school desegregation case was sent to all class members and published in newspapers; it did not consider whether individual notice was constitutionally necessary (616 F. 2d at 310).

[10]For the first three days of publication the notice appeared in the fine print used for legal notices, but for the remainder of the time it appeared in standard type and was highlighted with a black border (Pet. App. 14 n.3). Copies of the notice were distributed to community groups and to merchants and churches in the class members' neighborhoods and were made available to local radio and television stations (*id.* at 14, 49). The district court's order approving the notice remarked that there was a "great amount of local publicity concerning all prior orders and proceedings" (*id.* at 49).

[11]The court of appeals found that "[a]ll members of the class necessarily lived within the Tucson School District No. 1, an area served by newspapers carrying the notice, and were subject to all of the additional publicity generated by the suit" (Pet. App. 49).

and it concluded that "there was widespread actual notice of the settlement and the hearing as a result of the published notice and other sources, and a number of class members did in fact come forward to object. It being reasonably concluded that this form of notice would be effective, and with the subsequent indications that it did in fact reach large numbers of the class, we find no abuse of discretion or violation of due process in the form of notice provided" (*id.* at 50-51).

The petitioners' reliance on *Mullane* v. *Central Hanover Bank & Trust Co., supra,* and *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), for the proposition that individual mailed notice of a settlement hearing must be given whenever practical is misplaced. In *Mullane,* this Court ruled that notice simply by publication in a New York newspaper denied due process to known beneficiaries of a common trust fund, many of whom resided outside of New York, because it was not reasonably calculated to apprise the beneficiaries of the initiation of litigation which could deprive them of substantial property interests in the common trust fund. In contrast, this case involves notice of a proposed settlement of a highly publicized class action seeking injunctive relief on behalf of a geographically concentrated class of individuals, whose interests were represented by counsel during all phases of the four-year period of litigation that preceded settlement. Notice by publication was found to be improper in *Eisen* because it was a Fed. R. Civ. P. 23(b)(3) class action governed by the special notice requirements of Rule 23(c)(2), designed to inform class members of the pendency of the class action. Those notice requirements are unique to Rule 23(b)(3) class actions, which involve property interests similar to those at stake in *Mullane.*[12] *Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at

[12]The individual notice requirement articulated in *Mullane* was incorporated in Rule 23(c)(2) when it was revised in 1966. *Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at 173-174.

177 n.14; *Sosna* v. *Iowa*, 419 U.S. 393, 397 n.4 (1975). In contrast, Rule 23(e) (which governs notice of proposed settlements of class actions) vests the district court with discretion to determine the form of notice "subject only to the broad 'reasonableness' standards imposed by due process." *Grunin* v. *International House of Pancakes, supra*, 513 F. 2d at 121; see also *In re Gypsum Antitrust Cases*, 565 F. 2d 1123, 1126-1127 (9th Cir. 1977).

2. The petitioners argue that the desegregation plan was part of the settlement in this case and that therefore its provisions should have been set forth in greater detail in the notice of the settlement hearing[13] and the plan should have been subject to review at the settlement hearing. But both the district court (Resp. TUSD App. XI, Tr. Vol. IV 480)

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[13]Specifically, petitioners argue that the notice of settlement should have stated that three schools would be closed as part of the desegregation plan. The fact that the desegregation plan was not a part of the settlement disposes of the argument that the notice should have provided greater details of the desegregation plan. Moreover, each resident of the school district was mailed an English/Spanish newsletter just three weeks before the trial court approved the settlement notice (Pet. App. 169). It set forth the details of the District's preferred desegregation plan and identified the three schools to be closed (Resp. TUSD Br. 18; Resp. TUSD App. I).

Petitioners also claim that the notice was defective because it failed to specify that certain counts in the Mendoza amended complaint relating to the adequacy of education for Mexican-American students would be dismissed. Counts 2, 5, and 6 of the complaint were severed before trial because the Department of Health, Education, and Welfare had approved the District's compliance plan (Pet. App. 6). However, the severance was conditioned on the understanding that "all evidence presented during the course of trial * * * may be considered by the Court in any ultimate disposition of said counts" (C.A.R. 3995). The district court found "at the time of trial all of the District's educational services were in full compliance with federal standards" (*id.* at 2495). Thus, dismissal of these counts simply recognized the effect of that finding; it was acarcely a significant aspect of the settlement. In these circumstances, it was enough that the settlement notice warned class members of the binding effect of approval of the settlement (Pet. App. 163).

and the court of appeals (Pet. App. 22-24, 27) found that the desegregation plan was not part of the parties' settlement agreement, but was instead the independent result of the district court's approval of the plan submitted by the District. Thus petitioner's argument is simply an attack on the lower courts' factual findings that the plan was not negotiated as part of the settlement. They do not suggest any other basis for requiring reconsideration of the desegregation plan in the settlement hearing, and we are aware of none. See *Reynolds* v. *National Football League*, 584 F. 2d 280, 285 (8th Cir. 1978); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1156, 1168-1170 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Absent "a very obvious and exceptional showing of error" (*Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)), which is not present here, this Court will not interfere with concurrent findings of fact of two lower courts.

Those findings are in any event correct.[14] The court of appeals, consistent with the approach taken by other circuits (see *Pettway* v. *American Cast Iron Pipe Co., supra*; cf. *Reynolds* v. *National Football League, supra*), considered the process by which the plan was created.[15] After a full trial on the merits of the unlawful segregation claim, the district court found that nine schools still suffered from the effects of past segregation, and ordered the District to pro-

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[14]Contrary to petitioners' claim (Pet. 43-44), it is not significant that the settlement agreement incorporated the provisions of the desegregation plan. The settlement was not filed until the court had approved the plan. Accordingly, it is scarcely surprising that the parties' agreement reflected the court's decision.

[15]In *Pettway*, the court of appeals observed that "[s]ettlements and court judgments are not distinguished by different platonic essences, but by the processes of their creation" (576 F. 2d at 1170). In this case the court of appeals properly focused on the process of approval of the desegregation plan, rather than the specific language used in the order approving the desegregation plan or the stipulation of settlement (*id.* at 1172).

pose a desegregation plan for those schools and submit it for review (Pet. App. 6-7, 62).[16] The court hold a hearing on the submitted plans at which "Sanchez and others" presented their objections to the proposed closings (*id.* at 39-40). The district court's order approving the District's plan shows that it carefully evaluated those objections before approving the plan (Pet. App. 84-85, 88). As the court of appeals noted, the trial judge was fully able to make an independent assessment of the constitutionality of the desegregation plan because of his thorough familiarity with the case (*id.* at 39 n.11).[17]

3. Petitioners argue that the settlement should be set aside because it was negotiated simultaneously with the provision for attorneys' fees for plaintiffs' counsel (Pet. 32-42). The court of appeals joined other circuit courts in condemning this practice on the ground that it frequently creates the appearance of impropriety (Pet. App. 58). The court held, however, that in the circumstances of this case, the settlement should not be set aside (*id.* at 60). The petitioners apparently urge adoption of a per se rule which would require nullification of any settlement when such

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[16]The district court did not engage in any negotiations concerning the content of the desegregation plan. Compare *Pettway* v. *American Cast Iron Pipe, supra*, 576 F. 2d at 1173-1174. Furthermore, the court of appeals found that "there is no evidence that the plan itself was a product of settlement negotiations" (Pet. App. 39 n.11).

[17]For example, the district court carefully analyzed the reasons for closing the schools and the impact the plan would have on students attending those schools (Pet. App. 85-96). It found that the reasons for closing the schools were non-racial: declining enrollment, inadequate sites and classroom sizes, and the need for extensive repairs and improvements. Moreover, it concluded that as a result of closing these schools minority students would attend more modern facilities with a broader range of educational programs.

The district court's familiarity with the facts of the case and the legal principles to be applied is also reflected in its voluminous findings of fact and conclusions of law at the liability stage of the case (C.A.R. 2326-2816).

negotiations have taken place.[18] No court has adopted such a rule; instead the court of appeals' more flexible approach is consistent with the decisions of other courts of appeals. See *Reynolds* v. *National Football League, supra*, 584 F. 2d at 285-287; *McDonald* v. *Chicago Milwaukee Corp.*, 565 F. 2d 416, 421-423 (7th Cir. 1977); *Sussman* v. *Lincoln American Corp.*, 561 F. 2d 86 (7th Cir. 1977); *Brick* v. *CPC Intern, Inc.*, 547 F. 2d 185 (2d Cir. 1976).

The court of appeals did not find any actual improprieties in the negotiation of the settlement (Pet. App. 57). Moreover, it concluded that in the particular circumstances of this case, there were sufficient factors to "neutralize the potential for impropriety" (*ibid.*). The Justice Department's involvement in the case since before the trial on the merits was "a significant factor in quieting the potential for unfair treatment of minority interests within the plaintiff's class. [*Marshall* v.] *Holiday Magic*, 550 F. 2d [1173] at 1178 [9th Cir. 1977]. See *Developments [in the Law—Class Actions*, 89 Harv. L. Rev. 1318,] *supra*, at 1563 [1976]" (Pet.

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[18]Petitioners do not contend that the fees awarded were excessive. Although they do suggest that the remedy negotiated for the Mexican-American plaintiff class casts doubt on the adequacy of their representation, they do not directly challenge the adequacy of the settlement here, nor did they challenge it below. In any event, the terms of the settlement do not support the contention that the Mexican-American class received substantially fewer benefits than the black class. Most of the provisions were equally applicable to both plaintiff classes (Pet. App. 129-133 paras. 4-8, 134, para. 11, 134-136, paras. 12-15, 138-139, paras. 17-19). Only three provisions were directed at a particular class (*id.* at 133-134, paras. 9, 10, (blacks), 16) (Mexican-Americans)). Moreover, the court had determined in the liability stage of the case that the District had not unlawfully segregated Mexican-American students and had not engaged in system-wide discrimination against them (Pet. App. 7). By contrast, it found that black students had been subjected to racial segregation, the effects of which continued after 1954 (*ibid.*). Finally, as the district court noted, it is of some significance in assessing the adequacy of the settlement that only 121 persons out of the

App. 59).[19] The court also found it significant that there is statutory authorization (20 U.S.C. 3204) for the award of attorneys' fees in cases such as this (Pet. App. 59).[20]

The district court here was in a particularly good position to judge the fairness of the settlement to all the plaintiff classes because of its long familiarity with the case. The settlement was achieved only after years of discovery, a full trial on the merits, a finding of liability, and a hearing on the constitutional adequacy of the District's desegregation plan. In addition, the district court took steps to insure that divergent views were represented when it appointed counsel to represent Sanchez, allowed discovery on issues pertaining to the settlement and held a hearing on the proposed settlement. See *McDonald* v. *Chicago Milwaukee Corp., supra*, 565 F. 2d at 422-423.

In sum, the court of appeals' approval of the simultaneous negotiation of attorneys fees and the settlement agreement turns on the particular facts of the case, in which there was neither any actual impropriety nor any significant potential for impropriety. The decision below scarcely

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approximately 18,500 members of the plaintiff classes objected to it (see note, 8, *supra*). Compare *Pettway* v. *Americam Cast Iron Pipe Co., supra*, 576 F. 2d at 1217-1218.

[19]Although the government lawyers did not participate in the fee negotiations, they did agree that the settlement terms were fair, and adequately protected the rights of all affected minority groups.

[20]In addition, although it emphasized that the potential for a conflict of interest does not depend on the existence of a common fund to be divided among class members, or even on claims for money damages, the court of appeals recognized (Pet. App. 56 n. 19) that the potential for conflict "may not be as great" where, as here, only injunctive relief is sought.

establishes any broad precedent favoring such simultaneous negotiations.[21] Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[21] Indeed, the court warned (Pet. App. 57): "[i]t would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place."